Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JAMES LAWRENCE BYRNE, and
JAMIE BYRNE CREECH,
Petitioners,

v.

THE UNITED STATES,
Respondent.

**Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Federal Circuit**

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

1. Whether the U.S. Court of Federal Claims (as affirmed by the Court of Appeals) erred in denying appellants' motion to enlarge time under Fed.R.App.P., Rule 4(a) for good cause or excusable neglect because of confusion as to the effect of a notice of appeal filed prior to determination of a motion to reconsider an Order granting Summary Judgment to defendant United States.

2. Whether the U.S. Court of Federal Claims (as affirmed by the Court of Appeals) erred in denying appellants' motion to enlarge time under Fed.R.App.P., Rule 4(a) for good cause or excusable neglect because of the failure of the clerk to timely notify appellants of dismissal of their premature notice of appeal after docketing thereof.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioners:

JAMES LAWRENCE BYRNE, and

JAMIE BYRNE CREECH

Respondent:

THE UNITED STATES

There are no parent or subsidiary companies to be listed.

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2. THE DECISION OF THE COURT OF FEDERAL CLAIMS (AS UPHELD BY THE COURT OF APPEALS) PRESENTS AN IMPORTANT QUESTION CONCERNING FAILURE OF THE CLERK TO TIMELY DISMISS A PREMATURE APPEAL AS GOOD CAUSE OR EXCUSABLE NEGLECT FOR A MOTION TO ENLARGE TIME UNDER RULE 4(A) 5

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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JAMES LAWRENCE BYRNE, and
JAMIE BYRNE CREECH,
Petitioners,
v.
THE UNITED STATES,
Respondent.

**Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Federal Circuit**

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit under Appeal No. 94-5006 (Unreported) dated 2/14/94, App. B, affirming the decision of the United States Court of Federal Claims under No. 90-3916 L (Unreported) dated 7/23/93, App.D, and denial of Motion to Reconsider (Unreported) dated 8/16/93, App. C. United States Court of Appeals for the Federal Circuit Dismissal of Appeal No. 93-5123 (Unreported) as having "no effect" dated 7/6/93, App. E and Order Denying Reconsideration (Unreported) dated 8/25/93, App. E.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on 2/14/94. App. A-B This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND AND RULES INVOLVED

The due process clause of the Fifth Amendment to the Constitution of the United States, App. J, Federal Rules of Appellate Procedure Rule 4 (a) (as amended, 1988), App. I and 1993 practice notes to Rule 4 for the Federal Circuit, App. K.

STATEMENT OF THE CASE

This case concerns an appeal of a United States Court of Federal Claims denial of appellant's motion to enlarge time to file a renewed notice of appeal after dismissal of appellant's "premature" notice of appeal filed prior to determination of appellants' motion to reconsider an order of the court of Federal Claims granting summary judgment to defendant United States,App. H. The denial of appellants' motion to enlarge time was affirmed on appeal by the United States Court of Appeals for the Federal Circuit.

The subject Notice of Appeal, App. G, noted on its face that it was filed "subject to a motion to reconsider". The clerk of the Court of Appeals, however, docketed said appeal and did not dismiss the appeal until after the time had expired to file a renewed notice of appeal. Appellants had timely submitted their Brief prior to dismissal of said appeal, App. L.

Jurisdiction of the United States Court of Appeals for the Federal Circuit was based on appeal from the United States Court of Federal Claims Order granting summary judgment for defendant United States in a case involving an inverse "taking" of appellant's 20 year defeasible term nonparticipating, nonexecutive royalty rights in violation of the Fifth Amendment of the United States Constitution under 28 U.S.C. § 1295(a)(3). Jurisdiction of the United States Court of Federal Claims rested on 28 U.S.C. § 1491(a)(1).

REASONS FOR GRANTING WRIT

1. THERE IS SUBSTANTIAL DISPARITY OF TREATMENT IN VARIOUS CIRCUITS CONCERNING THE EFFECT OF PREMATURE NOTICE OF APPEAL WITH RESULTING CONFUSION WHICH IS GOOD CAUSE OR EXCUSABLE NEGLECT FOR A MOTION TO ENLARGE TIME UNDER RULE 4(A).

Premature notices of appeals are subject to much confusion and conflicts in decisions or treatment in various circuits resulting in tolling or dismissal of premature appeals or even in divestment of jurisdiction of the trial court, as follows:

It has long been noted that the 1979 amendments to Federal Rule of Appellate Procedure 4(a) "created a trap for an unsuspecting litigant who files a notice of appeal before a postrial motion or while a postrial motion is pending." 17 Dig. U.S. S.Ct. Rep.L.Ed. 158 (1993).

Under the early rule laid down by this court in *Griggs vs. Provident Consumer Discount Co.*, 103 S.Ct. 400 (1982) the court of appeals was found to lack jurisdiction to hear an appeal under a prematurely filed notice of appeal unless a new notice was filed.

Although the Federal Circuit has strictly and consistently followed the *Griggs* rule in holding that various post judgment motions render prematurely filed notice of appeal of "no effect" in line with the subject case, *Jurgens vs. McKasy*, (Fed. Cir., 1990) 905 F.2d 382, other circuits have distinguished certain types of cases because of confusion over the lapse or suspension of premature notices of appeal.

Although adhering to the *Griggs* rule, the 7th Circuit was one of the first courts to note dissatisfaction with Rule 4(a) because of the burial of the language requiring of filing a renewed notice of appeal in Rule 4(a)(4). *Averhart vs. Arredondo*, (7th Cir., 1985) 773 F.2d 919, 920.

Criminal law cases in the Fifth Circuit treated the notice of appeal as dormant in *Burt vs. Ware*, (5th Cir., 1994) 14 F.3rd 256. A slightly different approach to save an appeal in a criminal case was taken by this Court in *Smith vs. Barry*, 112 S.Ct. 678 (1992) in which case this Court allowed a Brief timely filed pursuant to Rule 3 as an effective notice of appeal. In the present case the appellant's Brief was timely submitted as required by Rule 31, Fed. R. App P.

A number of circuits have also held an appeal timely where as in this case appellant was lulled into not filing a renewed notice or other necessary motion because of reliance on the representations of the clerk of the court. (The representations of the clerk relied on in this case being the continued docketing of said appeal), App. L. *Willis vs. Newsome*, (11th Cir., 1984) 747 F.2d 605; *Estle vs. Country Mutual Ins. Co.*, (8th Cir., 1992) 970 F.2d 476; and *In Re Frontier Airlines*, (D. Col., 1989) 15 Fed.R. Serv. 3rd 897 or where dismissal resulted from failure of the clerk to file the record, *Yadav vs. Charles Schwab & Co.,Inc.*, (2d Cir., 1991) 935 F.2d 540.

Other Courts have held that the filing of a motion to reconsider is not a good reason to destroy an appeal and have applied a tolling concept. *Shields vs. Consolidated Rail Corp.*, (3rd Cir., 1987) 810 F.2d 397, 399.

Language in Fed. R. App. P. Rule 4(a)(2) is also somewhat confusing in that it appears to correspond roughly to Tex.R.App.P., Rule 41(c) which provides that no notice of appeal shall be ineffective because of premature filing, App. M.

Argument has also been advanced that once a notice of appeal has been filed the trial court is divested of any further jurisdiction including authority to hear motions for reconsideration. Allen Ides "The Authority of a Federal District Court to Proceed After Notice of Appeal Has Been Filed", 143 Fed.R.Dec. 307, 308. Said treatise raises some important considerations where, as in the present case the Motion for Reconsideration and the Notice of Appeal were submitted simultaneously to the clerk's office.

Appellant believes that confusion caused by application of various rules by various courts in regard to the effect given premature notices of appeal together with the confusion of language in Fed.R.App. P., Rule 4(a) (2) and (4) provide adequate good cause or excusable neglect for a motion to enlarge time and should be considered by this court because of said confusion.

2. THE DECISION OF THE COURT OF FEDERAL CLAIMS (AS UPHELD BY THE COURT OF APPEALS) PRESENTS AN IMPORTANT QUESTION CONCERNING FAILURE OF THE CLERK TO TIMELY DISMISS A PREMATURE APPEAL AS GOOD CAUSE OR EXCUSABLE NEGLECT FOR A MOTION TO ENLARGE TIME UNDER RULE 4(A).

Appellants allege that the Court of Appeals and the Court of Federal Claims erred in failing to find that appellants had good cause or excusable neglect for a motion to enlarge time because of appellant's reliance on what appeared to be an orderly progression of events of the appeal which lulled appellants into believing that a renewed notice was unnecessary because of the clerk's failure to timely and seasonably dismiss said appeal prior to expiration of time to file notice and submission of appellants Brief, as follows:

The clerk had a duty to timely dismiss the appeal. As indicated by practice notes included with Rule 4, the clerk of the court of appeals was required to dismiss the appeal upon learning that a post judgment motion was filed in the trial court. See Practice Note to Rule 4, *Rules of Practice Before the United States Court of Appeals for the Federal Circuit* (1993), App. K.

Appellants allege that the clerk was notified of the filing of the motion for reconsideration by language on the face of the Notice of Appeal making said notice "subject to" said motion for reconsideration, App. G. The duty of the Clerk to screen notices of appeal is discussed in *Campbell vs. White*, (8th Cir., 1983) 721 F2 644. See also reference to the clerk's duty in Moore's *Federal Practice*, ¶. 204.13 [1.-2] and n.26; discussion of a party's failure to timely file notice based on acts or failure to act of someone other than appellant, including the clerk is found in *650 Park Ave. vs. McRae*, (2d Cir., 1988) 836 F.2d 764, 10 F.R. Serv. 3rd 121 at 125, and in cases from a number of circuits holding an appeal timely where as here, appellant was lulled into not filing a renewed notice because of reliance on representations of the clerk of the court. See *Willis vs. Newsome*, et. al. discussed in the foregoing section.

This dismissal without timely notice to allow appellants to seasonably cure presents an important question in addition to the foregoing because said inadequate notice of dismissal resulted in deprivation of appellants' property rights which violated the Fifth Amendment requirements of "procedural due process" as follows:

Thurber vs. Brown, (Crt. of Vet. App., 1993) 5 Vet. App. 119 at 125, citing notice requirements of FED. R. Evid. 106 and 201(e) and the advisory committee notes in 56 FRD at 206 states:

> "In the absence of advance notice, a request made after the fact could not in fairness be considered untimely".

The *Thurber* decision, at 122, citing *Mathews vs. Eldridge*, (1976) 96 S.Ct. 893, 902 further notes that the Fifth Amendment due process clause requires that when an individual is to be deprived of a property interest as a result of a government action the aggrieved party must be provided notice at a meaningful time and in a meaningful manner.

A similar result was recently reached by a California District Court in *Cabo Distributing Co.,Inc. vs. Brady*, (ND Cal., 1992) 821 F. Supp. 601 at 609 which held that the due process clause requires "adequate notice".

In the present case, the appellant's were totally deprived of any right of hearing of their appeal of the Court of Federal Claims Summary Judgment decision resulting in the loss of all right of appeal concerning the "taking" of their royalty rights as a result of the dismissal of their notice of appeal and the denial of appellants' motion to enlarge time to file a renewed notice of appeal. This is a very harsh result. Appellants believe that the failure of the clerk to timely

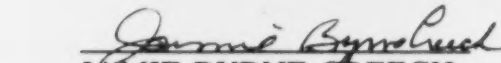
notify appellants of dismissal of their premature notice of appeal after docketing thereof was a breach of the clerk's duty and violated procedural due process notice requirements of the Fifth Amendment and was adequate good cause or excusable neglect for appellants' motion to enlarge time.

Appellants allege that if their appeal had not been dismissed they had met their burden as described in *Cabo* and as necessary to defeat the government's summary judgment. Appellants rights are well supported by numerous decisions of the Court of Federal Claims, and of this Court, including the Court's recent decision *Lucas vs. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), and the even more recent decision of the D.C. Circuit Court of Appeals in *Sweet Home Chapter vs. Babbitt* (DC Cir., 1994) 38 ERC 1202 which also extended protection against unauthorized "takings" for environmental regulations. The Court of Federal Claims clearly abused its discretion in granting summary judgment to defendant United States on evidence presented before the Court at Summary Judgment and should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5006

JAMES LAWRENCE BYRNE, and
JAMIE BYRNE CREECH,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS in CASE NO(S). 90-3916L

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED FEB 14 1994 /s/ Francis X. Gindhart
Francis X. Gindhart,Clerk

ISSUED AS A MANDATE: March 7, 1994

APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

94-5006

JAMES LAWRENCE BYRNE, and
JAMIE BYRNE CREECH,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: February 14, 1994

Before ARCHER, MAYER, and PLAGER, *Circuit Judges*.

PER CURIAM.

James L. Byrne and Jamie B. Creech (appellants) appeal the decision [1] of the United States Court of Federal Claims (CFC), No. 90-3916L, denying for lack of good

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[1] The court rendered its decision July 23, 1993. That decision became final on August 16, 1993, when the court denied appellants' motion for reconsideration.

cause appellants' motion to enlarge the time in which to file a renewed notice of appeal to this court.[2] We *affirm*.

DISCUSSION

On appeal, our standard of review is narrow. We must affirm the decision of the CFC unless we find there to have been an abuse of discretion. *Penrod Drilling Co. v. United States*, 925 F.2d 406, 408 (Fed. Cir. 1991).

Appellants first argue the court incorrectly perceived the reason underlying their failure to file a timely renewed notice of appeal. According to appellants, it was not because they failed to understand the applicable rules, but because the clerk of this court breached his duty under the practice note accompanying Fed. Cir. R. 4[3] to immediately dismiss their appeal, which, appellants' assert, was patently defective. Had the clerk done so, argue appellants, they would have been put on notice of the deficiency within the prescribed time period for filing a notice of appeal under Fed. R. App. P. 4(a)[4] -- June 14, 1993. Accordingly, argue appellants, they would have been able to timely file a renewed notice of appeal.

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[2] Their earlier notice of appeal was dismissed by order of this court on July 6, 1993. *Byrne v. United States*, No. 93-5123 (Fed. Cir. July 6, 1993). The reason was that the notice was filed while appellants had pending before the CFC a motion for reconsideration of that court's judgment. Thus, under Fed. R. App. P. 4(a)(4), the notice was a legal nullity: "A notice of appeal filed before the disposition of [a motion for reconsideration] shall have no effect."

[3] According to which, "[t]he clerk will dismiss an appeal upon learning that a motion that renders the notice of appeal of no effect has been filed in the trial court."

[4] "[I]f the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after [the entry of the judgment or order appealed from]."

We are not persuaded. First, we are not convinced that the defect was "patently" defective in relation to the clerk, who had limited information at his disposal with which to judge the competency of the appeal -- the notice of appeal itself plus the lower court's docket sheet. That is a distinction which is reflected in the full passage of the practice note containing the excerpt cited by the appellants.[5] That passage establishes that any duty of the clerk's to immediately dispose of an appeal arises only *upon notification by one of the parties that a motion for reconsideration has been filed.* Second, a practice note is at most permissive, and cannot function to create a legal obligation. Third, even assuming for the sake of argument the clerk did breach his duties, that does not absolve appellants from their failure in the first instance to apprehend the import of Fed. R. App. P. 4(a)(4). That rule plainly renders as a legal nullity any notice of appeal filed while a motion for reconsideration is pending. Thus, the responsibility for the untimely filing must ultimately lie with appellants. Fourth, appellants admit in their brief that their confusion was caused by their reliance on Fed. R. App. P. 4(a)(2).[6] That rule is plainly inapplicable because their initial notice of appeal was *not* filed before the entry of the judgment appealed from. Accordingly, we are not convinced the CFC misapprehended the reason underlying appellants' failure to file a timely notice.

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[5] "The appellant should promptly notify the clerk if any party in the case files in the trial court a motion [for reconsideration]. Any other party may also notify the clerk when this occurs. The clerk will dismiss an appeal upon learning that a motion that renders the notice of appeal of no effect has been filed in the trial court."

[6] "[A] notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof."

The only case cited by appellants which even plausibly supports their argument if *Yadav v. Charles Schwab & Co.*, 935 F.2d 540 (2d Cir. 1991), *cert. denied*, 60 USLW 3780 (1992). That case involved, as here, the dismissal under Fed. R. App. P. 4(a)(4) of an appeal which occurred after the deadline for filing an appeal. The court found that the dismissal was improper because the rendering of the dismissal beyond the deadline was caused by the trial court's failure, under Fed. R. App. P. 3(d)[7], to transmit "forthwith" to the appellate court a copy of the notice of appeal and the docket sheet. *Id.* at 541-42. Had this information been transmitted earlier, the appellate court would presumably have dismissed the appeal before the deadline for filing a renewed appeal had passed. That cannot be said to have occurred here. A check with this court's clerk office reveals that appellants' initial notice of appeal (plus a docket sheet) was transmitted to this court on April 16, 1993. That was at most within four days of the date appellants filed their notice of appeal with the CFC.[8] Thus, it cannot be said that the CFC violated Fed. R. App. P. 3(d). Moreover, as noted, this court did not breach any *rule* by failing to immediately act on the appeal. The case is thus distinguishable.

Appellants next argue that disruption to Creech's office due to a bankruptcy foreclosure seizure establishes good cause for the delay. We cannot agree. The seizure in

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[7] "[T]he clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice."

[8] The record is unclear as to the precise date appellants' filed their notice of appeal with the CFC. The stamp on the notice attached to appellants' brief is dated April 12, 1993. However, according to this court's clerk's office, the notice was filed on April 15, 1993.

question occurred on June 15, 1993, *after* the deadline for filing the appeal. Thus, that event cannot constitute good cause for the delay.

Appellants also argue that the CFC impermissibly applied the "excusable neglect" standard as opposed to a more lenient "good cause" standard. We cannot agree. First, it is unclear that the "excusable neglect" standard is the incorrect one. According to the Notes of the Advisory Committee accompanying Fed. R. App. P. 4(a)(5)[9], the "excusable neglect" standard is the appropriate one for motions filed, as here, after the time for filing the notice of appeal has run. Second, according to the CFC opinion, the "good cause" standard was applied. Thus, it appears the standard applied by the CFC was overly lenient.

Finally, appellants argue that a lower standard should be applied to their behavior because they are appearing *pro se*, and are unfamiliar with this court's rules. Again, we are unpersuaded. While some allowance is made regarding technical niceties when a party is *pro se*, all litigants are bound to comply with the rules. Furthermore, it is undisputed that Creech is an attorney, and is representing both herself and Byrne in this case.

For all the foregoing reasons, we are not convinced the CFC abused its discretion. Accordingly, we *affirm*.

---

[9] **The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of time prescribed by this Rule 4(a)."**

APPENDIX C

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS
No. 90-3916L

(Filed: August 16, 1993)

JAMES LAWRENCE BYRNE, AND
JAMIE BYRNE CREECH
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

ORDER

On July 23, 1993, an order was entered that denied plaintiffs' July 8, 1993, motion to enlarge time to file a renewed notice of appeal.

On August 2, 1993, plaintiffs filed motion to reconsider.

On August 6, 1993, defendant was ordered to file a response. Defendant's response, filed August 13, 1993, states plaintiffs have supplied no persuasive basis for the court to change its mind.

The July 23, 1993, order, including the following:

> Failure of counsel, or of counsel acting pro se, to understand the rules does not satisfy the "good cause" standard. Ignorance of the rules of procedure

does not excuse a pro se plaintiff, and disruptions in the office practice of an attorney, without more, would not amount to "good cause" for failure to file a new notice of appeal.

The additional matter included in plaintiffs' August 2, 1993, motion to reconsider does not satisfy the "good cause" standard applicable to Fed. R. App. P. 4(a). Accordingly,

IT IS ORDERED:

Plaintiffs' motion to reconsider is denied.

/s/ Kenneth R. Harkins
Kenneth R. Harkins, Senior Judge

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS
No. 90-3916L

(Filed: July 23, 1993)

* * * * * * * * * * * * * * * *

JAMES LAWRENCE BYRNE, AND
JAMIE BYRNE CREECH,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

* * * * * * * * * * * * * * * *

O R D E R

On July 8, 1993, plaintiffs filed a motion to enlarge time to file a renewed notice of appeal.

A judgment dismissing the complaint was filed on April 7, 1993, and plaintiffs' request for reconsideration was denied on April 14, 1993.

Plaintiffs had filed on April 12, 1993, a notice of appeal from the April 6, 1993, order that authorized the April 7, 1993, judgment. Plaintiffs did not file a new notice of appeal after the April 14, 1993, denial of the request for reconsideration. On July 6, 1993, the Federal Circuit noted

that plaintiffs' April 12, 1993, notice of appeal was of no effect pursuant to Fed. R. App. P. 4(a)(4), and dismissed the appeal.

Plaintiffs had 60 days to file a notice of appeal after the April 14, 1993, denial of the motion for reconsideration. Fed. R. App. P. 4(a)(4). That prescribed time expired on June 14, 1993. Plaintiffs had 30 days after expiration of the prescribed time to file a motion to extend the time for filing a notice of appeal. Fed. R. App. P. 4(a)(5). Accordingly, plaintiffs' July 8, 1993, motion to enlarge time was filed timely.

Defendant has stated a response to plaintiffs' motion to enlarge would not be filed.

Rule 4(a)(5) provides in part that the court, "upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal after the expiration of the time prescribed by this Rule 4(a)." Inasmuch as plaintiffs' motion to enlarge was filed timely, the "good cause" standard is applicable. See Notes of Advisory Committee on Appellate Rules, 1979 Amendment.

Plaintiffs are James Lawrence Byrne and Jamie Byrne Creech. Jamie Byrne Creech, an attorney, represents James Lawrence Byrne, and appears pro se. Plaintiffs state they failed to file a new notice of appeal after their motion for reconsideration was denied because they "misunderstood the rules" and relied on their interpretation of Rule 4(a)(2). Plaintiffs also point out that this was their first appeal to a Federal Court of Appeals, and that there were disruptions in the office and practice of the pro se plaintiff.

The time limits imposed by Rule 4 are not merely procedural requirements that may be waived at the discretion

of the court, but rather mandatory and jurisdictional in nature. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). Because the filing of a notice of appeal affects the jurisdiction of the appellate court, motions for extensions under Rule 4(a)(5) are subject to strict analysis and extensions are rare. *See*, e.g., *Penrod Drilling Co. v. United States*, 925 F.2d 406, 408 (Fed. Cir. 1991); *United States v. Atkinson*, 748 F.2d 659, 661 (Fed. Cir. 1984); *Quintin v. United States*, 746 F.2d 1452, 1453 (Fed. Cir.1984); *Cleek Aviation v. United States*, 20 Cl.Ct. 766, 768 (1990); *Prestex, Inc. v. United States*, 4 Cl.Ct. 14, 16-18 (1983).

Failure of counsel, or of counsel acting pro se, to understand the rules does not satisfy the "good cause" standard. Ignorance of the rules of procedure does not excuse a pro se plaintiff, and disruptions in the office practice of an attorney, without more, would not amount to "good cause" for failure to file a new notice of appeal.

On the basis of the foregoing, plaintiffs' motion to enlarge time to file a renewed notice of appeal is denied.

/s/ Kenneth R. Harkins
Kenneth R. Harkins, Senior Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

On consideration of the notice of appeal, it appearing that a motion of the type enumerated in Fed. R. App. P. 4 (a)(4) has been filed in the United States Court of Federal Claims rendering the notice of appeal of no effect, it is

ORDERED that the appeal be, and it hereby is, DISMISSED.

FOR THE COURT

July 6, 1993

/s/ Francis X. Gindhart
Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: July 6, 1993

cc: Clerk's Office, CFC
JAMIE BYRNE CREECH
JACQUES B. GELIN

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JUL 06 1993
FRANCIS X. GINDHART
CLERK

93-5123 - BYRNE V US
CFC - 90-3916L

* *
* Note: Pursuant to Fed. Cir. R. 47.8, *
* this order is not citable as precedent. *
* It is a public record. *
* *

APPENDIX F

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-5123

JAMES LAWRENCE BYRNE and
JAMIE BYRNE CREECH,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

ON MOTION

Before LOURIE, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

LOURIE, *Circuit Judge*.

O R D E R

James Lawrence Byrne and Jamie Byrne Creech (Byrne) move for reconsideration of the court's July 6, 1993 order dismissing their appeal as having "no effect" pursuant to Fed. R. App. P. 4(a)(4).[1] The United States has not filed a response.

---

[1] We are treating Byrne's July 28 and August 2, 1993 letters as a motion for reconsideration.

Fed. R. App. P. 4(a)(4) provides that:

> [i]f a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 to alter or amend the judgment . . . the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such action. A notice of appeal filed before the disposition of any of the above motions shall have no effect.

The court, pursuant to Rule 4(a)(4), dismissed Byrne's April 12, 1993 appeal because it was filed while Byrne's motion for reconsideration was pending.

Byrne argues that this court's April 16, 1993 docketing of the appeal, which occurred after the Court of Federal Claims denied Byrne's motion, rendered the notice of appeal timely. However, the clear language of Rule 4(a)(4) indicates that the dispositive date is the date of filing of a notice of appeal, not the date of docketing. Further, the legal authority cited by Byrne to support his other arguments is inapposite.[2] None of these arguments persuades us that

---

[2] *United States v. Cortes*, 895 F.2d 1245 (9th Cir. 1990) dealt with the Rule 4(b) governing criminal cases and *Yadav v. Charles Schwab & Co., Inc.*, 935 F.2d 540 (2d Cir. 1991) involved a district court clerk who failed to transmit a notice of appeal to the appellate court.

Byrne's reliance on *Smith v. Barry*, 112 S.Ct. 678 (1992) is misplaced. *Smith* held that if a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal. However, even if Byrne's brief gives the notice required by Rule 3, the brief was received after the 60-day appeal time had passed and therefore was not filed within the time specified by Rule 4.

the court's July 6, 1993 order was improper.[3]

Accordingly,

IT IS ORDERED THAT:

Byrne's motion for reconsideration is denied.

FOR THE COURT

AUG 25 1993 /s/ illegible
Date Alan D. Lourie
Circuit Judge

cc: Jamie Byrne Creech, Esq.
Jacques B. Gelin, Esq.

FILED
US COURT OF APPEALS
THE FEDERAL CIRCUIT
AUG 25 1993
FRANCIS X. GINDHART
CLERK

[3] We note that the 60-day appeal time has not yet passed for appeal of the Court of Federal Claims July 23, 1993 order denying Byrne's motion to enlarge the time to file a notice of appeal.

APPENDIX G

RECEIVED
APR 12 1993
OFFICE OF THE CLERK
U.S. COURT OF FEDERAL CLAIMS

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

JAMES LAWRENCE	§	
BYRNE, and JAMIE	§	No. 90-3916 L
BYRNE CREECH,	§	
Plaintiffs,	§	Honorable Kenneth
VS.	§	Harkins
	§	Senior Judge
THE UNITED STATES,	§	
Defendant.	§	

NOTICE OF APPEAL

Notice is hereby given that JAMES LAWRENCE BYRNE, and JAMIE BYRNE CREECH, plaintiffs, hereby appeal to the United States Court of Appeals for the Federal Circuit from the Order entered on April 6, 1993, after oral arguments on cross motions for summary judgment, granting summary judgment for defendant; and denying plaintiffs cross motion for summary judgment.

Said Notice of Appeal is filed subject to and simultaneously with plaintiffs Request for Reconsideration.

Dated: April 10, 1993.

Respectfully submitted,

JAMES LAWRENCE BYRNE, and
JAMIE BYRNE CREECH, Plaintiffs

BY /s/ Jamie Byrne Creech
JAMIE BYRNE CREECH, pro se, and
attorney for James Lawrence Byrne
11715 Leclerc Lane
Houston, TX 77077
713-493-6208

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Notice of Appeal has been served by first class US mail on the Clerk of the United States Court of Appeals for the Federal Circuit, and on Gregory Page, US Dept. of Justice, P. O. Box 663, Washington, D. C. 20044.

/s/ Jamie B. Creech

APPENDIX H

GENERAL DOCKET TITLE OF CASE	ATTORNEYS
	For PLF: wiso Jamie Byrne Creech 11715 Leclerc Lane Houston, TX 77077 /Pro Se/Atty
JAMES LAWRENCE BYRNE, AND JAMIE BYRNE CREECH v. THE UNITED STATES	
Taking of realty etc. DOI	
November 6, 1990 Complaint Filed five copies served on defendant. Amount Claimed $580,035	U.S. Gregory D. Page

General Docket Case No. 90-3916 L

Date	Proceedings
Nov 6 1990	Filing fee of $120 paid by plaintiffs.
Nov 6 1990	Notice of assignment to Senior Judge Kenneth R. Harkins filed. Copy to parties.
Dec 19 1990	Defendant's notice of appearance filed. Service: 12/18/90.
Jan 2 1991	Defendant's motion for enlargement of time (to February 6, 1991) to respond to complaint filed. service: 1/2/91. ALLOWED: JAN 3 1991.
Feb 6 1991	Defendant's notice of appearance filed. Service: 2/5/91.
Feb 6 1991	Defendant's motion for extension of time (to February 20, 1991) to file its answer filed. Service: 2/5/91. ALLOWED: FEB 7 1991.
Feb 20 1991	Defendant's answer filed. Service: 2/21/91.
Jun 13 1991	Plaintiffs' motion for enlargement of time (to July 25, 1991) for parties to file the joint preliminary status report filed by leave of the Judge. Service: 6/7/91. ALLOWED: JUN 14 1991.
Jul 25 1991	Joint preliminary status report filed.
Jul 29 1991	Order that concurrent discovery shall begin forthwith; and and dispositive motion be filed in 90 days filed. Copy to parties.
Oct 15 1991	Plaintiffs' motion for sanctions or motion to compel answers to interrogatories; and enlargement

	of time (to December 26, 1991) to comple discovery and file dispositive motions filed. Service: 10/11/91. MOOT: 10/28/91. Withdrawn per 10/23/91 joint motion.
Oct 23 1991	Joint status report; and motion for new briefing and discovery schedule as follows: January 28, 1992 - all discovery be completed; February 28, 1992 - any dispositive motion be filed. ALLOWED: OCT 28 1991 and So Ordered.
Feb 21 1992	Joint status report and related motion for new briefing schedule ie to file dispositive motions by April 20, 1992 filed. Service: 2/21/92. ALLOWED: MAR 3 1992.
Apr 22 1992	Plaintiffs' notice of filing of administrative record filed by leave of the judge. Service: 4/22/92.
Apr 22 1992	Administrative Record in two bound volumes filed.
Apr 22 1992	Plaintiffs' motion to extend time (to June 4, 1992) to file or respond to dispositive motion filed. Service: 4/21/92. ALLOWED: APR 28 1992.
Apr 23 1992	Defendant's motion for leave to file brief exceeding the page limit filed. Service: 4/23/92. ALLOWED: APR 28 1992.
Apr 28 1992	Defendant's motion for summary judgment filed.
Apr 28 1992	Defendant's proposed findings of uncontroverted facts filed.
May 8 1992	Defendant's response to plaintiff's motion to extend time to file or respond to dispositive motion filed by leave of the Judge. Service: 4/30/92.

Jun 19 1992	Plaintiffs' motion for summary judgment filed by leave of the Judge. Service: 6/2/92.
Jun 19 1992	Plaintiffs' response to motion for summary judgment filed by leave of the Judge. Service: 6/17/92.
Jun 19 1992	Plaintiffs' statement of genuine issues filed by leave of the Judge. Service: 6/11/91.
Jun 19 1992	Plaintiffs' exhibits filed by leave of the Judge.
Jun 26 1992	Defendant's motion for enlargement of time (to July 20, 1992) to file a consolidated reply to plaintiffs' response to its motion for summary judgment and a response to plaintiffs' motion for summary judgment filed. Service: 6/26/92. ALLOWED: JUL 10 1992.
Jun 26 1992	Plaintiffs' motion to file out of time their motion for summary judgment filed by leave of the Judge. Service: 6/23/92. ALLOWED: AUG 3 1992.
Jun 26 1992	Plaintiffs' motion to file over length briefs filed by leave of the Judge. Service: 6/23/92. ALLOWED: AUG 3 1992.
Jul 20 1992	Defendant's consolidated reply to plaintiffs' response to defendant's motion for summary judgment and response to plaintiffs' motion for summary judgment filed. Service: 7/20/92.
Jul 20 1992	Defendant's statement of genuine issues filed. Service: 7/20/92.
Aug 10 1992	Plaintiffs' motion for enlargement of time (to August 15, 1992) to respond to motion for summary judgment filed. Service: 8/7/92. ALLOWED BY ORDER ENTERED AUG 13 1992. Copy to parties.

Aug 13 1992	Plaintiffs' response to defendant's response to plaintiff's motion for summary judgment filed.
Jan 7 1993	Order entered directing counsel to contact the Judge's chambers as soon as possible to schedule oral argument. Copy to parties.
Jan 15 1993	Order entered scheduling oral argument. Copy to parties.
Apr 6 1993	Judge's order filed. Copy to parties with Plaintiffs served via Fed. Ex.
Apr 7 1993	Judgment entered that the complaint is dismissed. No costs. Copy to parties.
Apr 12 1993	Plaintiff's motion for reconsideration filed. Service: 4/10/93.
Apr 12 1993	Plaintiff's notice of appeal filed. Copy to defendant, and CAFC [$105.00 fee paid.] Receipt No. 33778. CAFC No. 93-5123.
Apr 13 1993	Defendant's confirmation of cite and Administrative Record correction accepted by court during oral argument filed by leave of the Judge. Service: 4/6/93.
Apr 14 1993	Transcript of proceedings (1 volume) taken at Washington, D.C. on April 2, 1992 filed. Notice to parties.
Apr 14 1993	Order entered denying plaintiffs' motion for reconsideration. Copy to parties.
Apr 20 1993	Defendant's response to request for reconsideration filed by leave of the Judge. Service: 4/16/93.

APPENDIX I

TEXAS RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of Right—When Taken
(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a distreict court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or

10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

* *

HISTORICAL NOTES

Amendments

1988 Amendment. Subd. (b) Pub.L. 100-690, § 7111, in the first sentence, inserted "(i)" after "entry of", and "or (ii)" a notice of appeal by the Government" at the end; and in the sentence beginning "When an appeal by the government is authorized., inserted "(i)" after "entry of", and inserting "or (ii) a notice of appeal by any defendant" at the end.

* *

APPENDIX J

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* *

HISTORICAL NOTES

Proposal and Ratification

The first ten amendments to the Constitution were proposed to the Legislatures of the several states by the First Congress on September 25, 1789, and were ratified on December 15, 1791. For the states which ratified these amendments, and the dates of ratification, see Historical Notes under Amendment I.

* *

APPENDIX K

(b) *Untimely notice of appeal.* -- The clerk may return a notice of appeal that is untimely on its face.

* * * * *

Practice Note

Time to appeal. This table is provided only as a convenience to counsel, who should refer to the statutes and case law before determining the period available for taking an appeal. Counsel should also take cognizance of the district court's authority under this rule to extend or reopen the time for appeal.

Court	*Statute*	*Time*
District Court	28 U.S.C. § 2107	30 days (60 days if U.S. is a party)
	15 U.S.C. § 3416(c)	30 days
Court of International Trade	28 U.S.C. § 2645(c)	60 days
Court of Federal Claims		
Appeals	28 U.S.C. § 2522	Same
Petitions	42 U.S.C. § 300aa-12 (f)	Same

Court of Veterans Appeals	38 U.S.C. § 7292	Same
High Court of the Trust Territory of the Pacific Islands	48 U.S.C. § 1681 note(1988)(Compact of Free Association; Federated States of Micronesia, Republic of Marshall Islands, TITLE II, Title One, Article VII, § 174 (c)).	30 days (60 days if U.S. is a party)

Untimely notice of appeal. The court of appeals is not empowered to waive the untimely filing of a notice of appeal.

Duty to notify the clerk of post-judgment motions in the trial court. The appellant should promptly notify the clerk if any party in the case files in the trial court a motion of the type enumerated in Fed. R. App. P. 4 (a)(4). Any other party may also notify the clerk when this occurs. *The clerk will dismiss an appeal upon learning that a motion that renders the notice of appeal of no effect has been filed in the trial court.* (emphasis added) If any party has already filed a brief in this court before an appeal is dismissed for this reason, that party may elect to proceed upon the same brief if a new notice of appeal is filed after

APPENDIX L

TITLE	BYRNE V US	
UNITED STATES COURT OF FEDERAL CLAIMS	FILING	TERM AND DOCKET NO.
J. Harkins	April 16, 1993	93-5123
DOCKET NO. 90-3916l	FILING FEE PAID 4/12/93	

DATE	PROCEEDINGS AND ORDERS
April 12,1993	Notice of appeal filed by Plaintiff in the US Ct. of Fed. Claims. (cs)
April 15, 1993	Notice of appeal and certified list, received. (cs)
	COUNSEL FOR THE APPELLANT:Jamie Byrne Creech MOB _X_ BAS __ _____
	COUNSEL FOR THE APPELLEE: Jacques B. Gelin MOB _X_ BAS __ _____
April 26, 1993	Certificate of Interest for the Appellant, filed.
	Certificate of Interest for the Appellee, filed.
April 16, 1993	Notice of appeal and certified list, docketed. Notice sent to the parties. (cs)
June 16, 1993	Received change of address for appellant. (tth)
June 15, 1993	BRIEF FOR APPELLANTS, filed. (MS-6/15) (sp)
	1. APPELLEE'S LETTER APPRISING THE COURT THAT APPELLANT FILED ITS NOTICE OF APPEAL APPEAL BEFORE THE DISPOSITION OF ITS MOTION FOR RECONSIDERATION. (MS-06/30/93)

RECEIVED: 07/02/93 (EOO 07/06/93) (JB) 93-5123

2. ORDER: ON CONSIDERATION OF THE NOTICE OF APPEAL. IT APPEARING THAT A MOTION OF THE TYPE ENUMERATED IN FED. R. APP. P. 4(a)(4) HAS BEEN FILED IN THE US CFC RENDERING THE NOTICE OF APPEAL OF APPEAL OF NO EFFECT, IT IS DISMISSED. ISSUED AS MANDATE AT FILING. FILED: 07/06/93 (EOD 07/06/93) (JB) 93-5123

July 12, 1993 **Received change of address for Jamie Byrne Creech** (tth)

3. PETITIONER'S LETTER REGARDING THE COURT'S ORDER DATED JULY 6, 1993 OF DISMISSAL UNDER FED.R.APP. P. 4(A)(4), (SENT TO SSA) (MS-07/28/93) RECEIVED: 08/02/93 (EOD 08/03/93) (JB) 93-5123

4. APPELLANT'S FELLOW-UP LETTER TO HER EARLIER LETTER DATED 7/28/93 REQUESTING THAT THE FED.R. APP.P. 4(A)(4) ORDER OF NO EFFECT BE RESCINDED. (SENT TO SSA) (MS-08/02/93) RECEIVED 08/05/93 (EOD 08/10/93) 93-5123

5. ORDER: IT IS ORDERED THAT: BYRNE'S MOTION FOR RECONSIDERATION IS DENIED. NOT SERVED FILED: 08/25/93 (EOD 08/25/93)(LP) 93-5123

A True Copy
Attest: April 26, 1994
/s/ Deborah V. Khen
Deputy Clerk

APPENDIX M

TEXAS RULES OF APPELLATE PROCEDURE

Rule 41 ....

(c) **Prematurely Filed Documents.** No appeal bond or affidavit in liew thereof, notice of appeal, or notice of limitation of appeal shall be held ineffective because prematurely filed. In civil cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the date of signing of the judgment or the date of the overruling of motion for new trial, if such a motion is filed. In criminal cases, every such instrument shall be deemed to have been filed on the date of but subsequent to the imposition or suspension of sentence in open court or the signing of appealable order by the trial judge, provided that no notice of appeal shall be effective if given before a finding of guilt is made or a verdict is received.

(Adopted by Supreme Court and Court of Criminal Appeals effective Sept. 1, 1986; amended by Court of Criminal Appeals effective July 1, 1989).

COUNSEL FOR THE APPELLANT(S)
(JAMES LAWRENCE BYRNE BYRNE, and JAMIE BYRNE CREECH
Plaintiffs below)

JAMIE BYRNE CREECH
P.O. BOX 441222
HOUSTON, TX 77244-1222
(713) 802-0138

7-21-93 (TTH)

COUNSEL FOR THE APPELLEE
(US. Defendant below)

JACQUES B. GELIN
DEPT. OF JUSTICE,
P.O. BOX 23795
L'ENFANT PLAZA STATION
WASHINGTON, DC 20026

5-4-93 (TTH)